No. 14,517

IN THE

United States Court of Appeals

For the Ninth Circuit

LIEUTENANT GENERAL W. G. WYMAN, or any other Commanding Officer of the Sixth Army, Presidio, San Francisco, California,

Appellant,

vs.

RUSSELL LOUIS LAROSE,

Appellee.

BRIEF FOR APPELLEE.

J. H. BRILL,
1069 Mills Building, San Francisco 4, California,
Attorney for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Authorities Cited

Cases

Codes

No. 14,517

IN THE

United States Court of Appeals

For the Ninth Circuit

LIEUTENANT GENERAL W. G. WYMAN, or any other Commanding Officer of the Sixth Army, Presidio, San Francisco, California,

Appellant,

vs.

RUSSELL LOUIS LAROSE,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

This Court has jurisdiction of this case under Sections 2243 and 2253 of Title 28, United States Code.

STATEMENT OF THE CASE.

Appellee petitioned for a writ of habeas corpus to release him from the custody of appellant on April 20, 1954 (Tr. 3-8). His petition was on the grounds that he was wrongfully and unlawfully detained and

imprisoned at Fort Scott, Presidio of San Francisco, California, in custody of appellant, and that he was unlawfully inducted into the armed forces in violation of his rights under the provisions of the Universal Military Training and Service Act and the regulations thereunder. United States District Judge George B. Harris issued an order to show cause why a writ of habeas corpus should not issue on April 21, 1954 (Tr. 8-9). A full hearing was had in the matter on May 7 and May 13, 1954 (Tr. 15-88). On June 18, 1954 Judge Harris issued an order granting the petition for writ (Tr. 9-10). On June 24, 1954 Judge Harris issued the writ (Tr. 12). Appeal was then made to this Court from the order, judgment and decree of the Court issuing the writ (Tr. 12-13).

FACTS.

At the time petition was filed appellee was a member of the Army, having been inducted in February, 1953. He was ordered inducted after having been theretofore classified as a I-A-O (conscientious objectors not opposed to non-combatant training and service). He repeatedly protested his classification and induction and on two occasions deserted the Army post to which he was assigned.

The entire draft file is in the record as Exhibit I and reveals that on January 22, 1952 appellee was classified I-A-O. On January 22, 1952, the same date as he was classified and before notice of classification,

appellee was ordered to report for Armed Forces physical examination on January 28, 1952. On January 26, 1952 appellee directed a letter to his draft board in which he advised he had had no notice of his classification but stated he could not appear for his physical examination until February 1, 1952, for reasons stated in his letter (Tr. 19). On January 28, 1952 appellee was advised he had failed to appear for physical examination and unless the board was contacted immediately the matter would be referred to the F.B.I. (Tr. 21).

On February 1, 1952, and within ten days after his classification, appellee wrote a letter to his board in which he stated in unequivocal language: "I request an appeal of my classification. I received my notice of classification two days ago. It stated that I had been classified I-A-O" (Tr. 21). He was not given an appeal or even a personal hearing by the board. On July 23, 1952 appellee was classified 2-S (Students' deferment), with a provision that it was to expire in June, 1953. On September 23, 1952 the local board changed his classification to I-A-O. Within two days thereafter appellee went in person to his local board to protest his classification but was told there was nothing further they could do and he was referred to the Appeal Board (Tr. 61-62). Still within ten days from his last classification, he went to the Appeal Board (Tr. 62) and was again advised his case was closed. Without being given a right to a personal appearance, before the local board, or an appeal for which he made a timely request, appellee was inducted.

"Section 1624.1 *Opportunity to appear in person.* (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended."

"Section 1624.3 *Induction postponed.* A registrant shall not be inducted during the period afforded him to appear in person before a member or members of the local board, and if the registrant requests a personal appearance he shall not be inducted until 10 days after the Notice of Classification (SSS Form No. 110) is mailed to him by the local board, as provided in Section 1624.2(d)."

"Section 1626.2 *Appeal by registrant and others.* (a) The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, or the government appeal agent may appeal to an appeal board from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition.

"(b) . . .

"(c) . . .

"(1) Within 10 days after the date the local board mails to the registrant a Notice of Classification (SSS Form No. 110)."

"Section 1626.13 *Local board to prepare appeal record and forward file.* (a) Immediately upon an appeal being taken to the appeal board by a person entitled to appeal, the local board shall prepare the Individual Appeal Record (SSS Form No. 120) in duplicate, attaching the original to the inside of the registrant's Cover Sheet (SSS Form No. 101) and placing the duplicate copy in the local board files . . . "

"Section 1626.14 *Time when record to be forwarded on appeal.* The registrant's file shall be forwarded to the appeal board, or appropriate panel thereof, immediately after the local board has complied with the provisions of Section 1626.13, but in no event later than five days after the appeal is taken. The local board shall enter in the Classification Record (SSS Form No. 102) the date it transmits the registrant's file to the appeal board or appropriate panel thereof."

"Section 1626.25 *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

(1) . . .

(2) . . .

(3) . . .

(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice."

"Section 1626.41 *Appeal postpones induction.* A registrant shall not be inducted either during the period afforded him to take an appeal to the appeal board or during the time such an appeal is pending."

QUESTIONS PRESENTED.

I. Did the local board fail to grant appellee a right to a personal appearance before it, in violation of Section 1624.1 of the regulations?

II. Did the local board fail to grant appellee a right to appeal his classification, in violation of Sections 1626.2, 1626.13, and 1626.14 of the regulations?

III. Did the local board and appeal board by thus refusing his right to appeal fail to grant appellee a right to a hearing before a hearing officer appointed by the Department of Justice, in violation of Section 1626.25, since his classification involved a claim that he was a conscientious objector?

IV. Did the local board violate Section 1626.41 of the regulations, since it required that appellee be inducted during the time an appeal of his classification was pending?

SUMMARY OF ARGUMENT.

I.

Did the local board fail to grant appellee a right to a personal appearance before it, in violation of Section 1624.1 of the regulations?

Section 1624.1 specifically provides that a registrant must be given a right to a personal appearance before the local board if he files a written request therefor within ten days after he has been notified of his classification. On January 22, 1952 he was classified. On January 26, 1952 he wrote the local board expressing dissatisfaction with his classification (Tr. 19-20). On February 1, 1952 he again wrote requesting an appeal (Tr. 21-22). Either or both of these letters should have been considered by the local board as a request for a personal appearance. See *Berman v. Craig,* 207 Fed. 2d 888.

II.

Did the local board fail to grant appellee a right to appeal his classification, in violation of Sections 1626.2, 1626.13 and 1626.14 of the regulations?

The regulations cited in the caption have reference to the method by which an appeal may be had by a registrant dissatisfied with his classification. Since the local board failed to accord appellee his right to

appeal which was properly and timely requested by appellee in his letter dated February 1, 1952 (Tr. 21-22), his classification was invalid and his induction and retention illegal.

Cox v. Wedemeyer, 192 Fed. 2d 920;
Knox v. United States, 200 Fed. 2d 398;
United States v. Stiles, 169 Fed. 2d 455;
United States v. Craig, 207 Fed. 2d 888;
Tung v. United States, 142 Fed. 2d 919;
United States v. Laier, 52 Fed. Supp. 392;
United States v. Peterson, 53 Fed. Supp. 760.

III.

Did the local board and appeal board by thus refusing his right to appeal, fail to grant appellee a right to a hearing before a hearing officer appointed by the Department of Justice, in violation of Section 1626.25, since his classification involved a claim that he was a conscientious objector?

The proper classification of appellee involved the question of whether he was a conscientious objector. As such he was entitled not only to an appeal but to a hearing before a hearing officer designated by the Department of Justice. The failure of the local board to grant him an appeal denied appellee of this substantial right. See Section 1626.25 Selective Service Regulations.

IV.

Did the local board violate Section 1626.41 of the regulations, since it required that appellee be inducted during the time an appeal of his classification was pending?

Section 1624.3 provides registrant shall not be inducted until ten days after his personal appearance. Section 1626.41 provides that registrant shall not be inducted during the time an appeal is pending and an appeal is taken by filing a written request therefor. Since the appeal in appellee's case had properly been taken it must be considered pending until acted upon. Thus appellee was inducted in violation of these two sections.

United States v. Stiles, 169 Fed. 2d 455.
Knox v. United States, 200 Fed. 2d 398.
Cox v. Wedemeyer, 192 Fed. 2d 920.

ARGUMENT.

I.

DID THE LOCAL BOARD FAIL TO GRANT APPELLEE A RIGHT TO A PERSONAL APPEARANCE BEFORE IT, IN VIOLATION OF SECTION 1624.1 OF THE REGULATIONS?

As the facts disclose on January 22, 1952 appellee was classified I-A-O, that is, a conscientious objector who was found not opposed to non-combatant training and service. Although no notice of classification had been received by appellee, he did receive a letter on or about January 26, 1952 ordering him to report for physical examination on January 28, 1952. Appellee immediately on said January 26, 1952 wrote a letter (Tr. 19) stating: "This afternoon I received your order for me to report . . ." He explained he had not received his classification, did not know what it was and explained why he could not be ex-

amined on January 28th but offered to go on February 1st. He explained he was attending a school 50 miles away from the nearest local board. On February 1, 1952 appellee disclosed that for the first time he had been notified of his classification and then and there objected to his classification (Tr. 21-22). His file disclosed that he was unalterably opposed to military training and service in any form.

As was stated in *Craig v. United States,* supra: "Registrants are not thus to be treated as though they were engaged in formal litigation assisted by counsel."

The two letters to the local board dated January 26, 1952 and February 1, 1952 disclose an unquestionable desire on the part of appellee to get a review of the classification. The regulations outline the procedural rights of the registrant and require under these circumstances that appellee was entitled to the opportunity to appear in person. This opportunity was not given appellee and he was therefore deprived of a substantial right.

United States v. Laier, 52 Fed. Supp. 392;
United States v. Peterson, 53 Fed. Supp. 760;
Knox v. United States, 200 Fed. 2d 398;
Cox v. Wedemeyer, 192 Fed. 2d 920;
Niznick v. United States, 173 Fed. 2d 328;
United States v. Zieber, 161 Fed. 2d 90;
Reel v. Badt, 141 Fed. 2d 845;
United States v. Craig, 207 Fed. 2d 888;
Davis v. United States, 199 Fed. 2d 689;
Tung v. United States, 142 Fed. 2d 919.

II.

DID THE LOCAL BOARD FAIL TO GRANT APPELLEE A RIGHT TO APPEAL HIS CLASSIFICATION, IN VIOLATION OF SECTIONS 1626.2, 1626.13 AND 1626.14 OF THE REGULATIONS?

The letter dated February 1, 1952 stated as follows: *"I request an appeal of my classification.* I received my notice of classification two days ago. It stated that I had been classified I-A-O. If you recall my conscientious objector application, this is not the classification I desire, and not the classification I will be satisfied with." (Italics ours.)

What more precise, unequivocal language could a registrant use to impress upon a local draft board that he was thereby appealing from the I-A-O classification. With all due respect to this Court, if this notice of appeal were written by a judge it could not have been more concise and to the point. Yet the local board disregarded the request and failed to prepare an appeal record as required by Section 1626.13 or forward the file to the appeal board within five days, as required by Section 1623.14 of the regulations. Instead it directly violated Section 1626.41 by ordering appellee inducted before this appeal properly taken by appellee was determined.

The citation of cases referred to under Point I is equally applicable here and is specifically referred to.

III.

DID THE LOCAL BOARD AND APPEAL BOARD BY THUS REFUSING HIS RIGHT TO APPEAL, FAIL TO GRANT APPELLEE A RIGHT TO A HEARING BEFORE A HEARING OFFICER APPOINTED BY THE DEPARTMENT OF JUSTICE, IN VIOLATION OF SECTION 1626.25, SINCE HIS CLASSIFICATION INVOLVED A CLAIM THAT HE WAS A CONSCIENTIOUS OBJECTOR?

Under the provisions of Section 1626.25 where the appealed from classification involved the question of conscientious objector the appellee was entitled to a hearing by a hearing officer designated by the Department of Justice. It is true that such determination is purely advisory and not binding upon the appeal board but it has been repeatedly held that failure to accord the right to such a hearing was a violation of due process.

> "Furthermore, under the rule stated in the case of *Sterrett v. United States,* supra, and *Triff v. United States* (No. 13,952, decided with *Sterrett v. United States*) registrant was refused the hearing by the Department of Justice which the statute required. Upon the authority of these two cases the judgment here cannot stand.
>
> Reversed."
>
> *Blevins v. United States,* No. 14,189. Decided November 26, 1954.

IV.

DID THE LOCAL BOARD VIOLATE SECTION 1626.41 OF THE REGULATIONS, SINCE IT REQUIRED THAT APPELLEE BE INDUCTED DURING THE TIME AN APPEAL OF HIS CLASSIFICATION WAS PENDING?

This point has been touched upon previously but it cannot be too strongly emphasized.

Section 1624.1 provides that registrant must be given an opportunity to appear in person if he files a written request. Section 1624.3 provides that he shall not be inducted during the period affording him the opportunity to appear and *he shall not be inducted until ten days after determination of his classification after personal appearance. After personal appearance he shall again be classified anew.*

Section 1626.41 bears the heading "Appeal postpones induction." By these provisions it was undoubtedly intended that if by chance a personal appearance or an appeal was overlooked after being requested the induction shall be invalid. No other reasonable explanation can be made for this statutory procedure so clearly set forth.

No substitute procedure will suffice. The draft board could not substitute another procedure for that made mandatory by the regulations. Neither could the local board refuse the appellee the right to appeal as was done after the second time appellee was given a I-A-O classification (Tr. 60, 61, 62, 63). The testimony of the appellee in this regard stands unimpeached. The appellant produced no testimony to controvert this testimony. With nothing more in the

record this would be sufficient to show that appellee was denied a right to a personal appearance or to an appeal. Again reference is made to the cases previously herein cited.

CONCLUSION.

The appellee respectfully submits that no error has been or can be shown and the judgment below should be affirmed.

Dated, San Francisco, California,
February 16, 1955.

J. H. Brill,
Atoorney for Appellee.